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In January 1961 the Supreme Court decided its ninth case dealing with the censorship of motion pictures.[1] For the first time since 1915 the decision ran in favor of the censor.[2] A majority of five justices held that states and local communities had the power to require a license for showing a film within their territory on the basis of a prior review and approval by a government official. A minority of four justices felt that such a system of censorship was a violation of the first amendment privileges enjoyed by the motion pictures as a medium of expression. The question posed by these dissenting justices was the crucial one of how the majority could reconcile the strictures that censorship necessarily involve with the freedom guaranteed by the first and fourteenth amendments.

Although the Bill of Rights mentions nothing specifically about censorship,[3] there is strong historical evidence that prior restraints on speech as epitomized in censorship by a government official were prohibited by the enactment of the first amendment.[4] This evidence has been relied on by the Court in several of its prior holdings,[5] and there is no lack of dicta to the same

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1 Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961); Kingsley Int'l Pictures Corp. v. Regents of New York, 360 U.S. 684 (1959); Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957); Holmby Prods. Inc. v. Vaughn, 350 U.S. 870 (1955); Commercial Pictures Corp. v. Regents of New York, 346 U.S. 587 (1954); Superior Films Inc. v. Department Educ., 346 U.S. 587 (1954); Gelling v. Texas, 343 U.S. 960 (1952); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915).

2 In *Mutual Film, ibid.* the Supreme Court upheld the censoring of motion pictures by Ohio and Kansas.

3 The wording of the Pennsylvania Constitution, however, seems to disallow any sort of prior restraint. William Goldman Theaters, Inc. v. Dana, 405 Pa. 83, 173 A.2d 59 (1961).

4 Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Prob. 648 (1955).

5 Grosjean v. American Press Co., 297 U.S. 233 (1936); Near v. Minnesota 283 U.S. 697 (1931).

effect.[6] Indeed, if one examines the almost necessary impact of any form of censorship on freedom of expression,[7] the conclusion would seem to be that the first amendment forbids such a system of control on the grounds of a practical infringement of protected liberty. Yet, despite these numerous arguments to the contrary, a majority of the Court insisted that censorship as regards motion pictures does not violate their guaranteed status under the first and fourteenth amendments.

By inquiring into the reasons behind this conclusion, it is hoped that other problems raised in the general area of free speech may also be clarified. For instance, the protection extended to various media of expression does not seem to be of an equal quality.[8] Further, the method of dealing with speech by the Court in its balance-of-interests technique has been questioned as a derogation from the first amendment.[9] And this question itself raises the issue of whether the states are equally bound with the federal government under the first amendment through the fourteenth. Finally, the whole question of obscenity and its relation to freedom of expression is critically involved in the censoring of movies. It is not the purpose of this article to solve all or any one of these complicated problems, but by investigating the decisions of the Court on motion picture censorship, it is hoped that some of these cognate areas of speech will be illuminated.

I.

It is important in understanding the current interpretation of the Court concerning motion pictures to return to the precedents which govern it. Many writers consider that the *Burstyn* decision[10] overruled entirely the earlier determination of *Mutual Film Corp. v. Industrial Comm'n.*[11] But a careful reading of Justice Clark's opinion reveals that the earlier precedent is over-

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[6] Kunz v. New York, 340 U.S. 290, 294-95 (1951); Cantwell v. Connecticut, 310 U.S. 296, 306 (1940); Schneider v. Irvington, 308 U.S. 147, 164 (1939); Lovell v. Griffin, 303 U.S. 444, 451 (1938).

[7] de Grazia, *Obscenity and the Mail: A Study in Administrative Restraint,* 20 Law & Contemp. Prob. 608 (1955); Emerson, supra note 4.

[8] Kalven, *The Metaphysics of the Law of Obscenity,* 1960 Sup. Ct. Rev. 1-45; Kauper, Civil Liberties and the Constitution, 119-20 (1962).

[9] Scales v. United States, 367 U.S. 203, 259 (1961); Black, J. dissenting in Konisberg v. State Bar of California, 366 U.S. 36, 56 (1961).

[10] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[11] 236 U.S. 230 (1915).

ruled only in so far as it fails to harmonize with the decision in *Burstyn*.[12] Therefore, it will be necessary to see what *Mutual Film* said, what it meant in the circumstances of 1915 and what it was used for in the intervening thirty-seven years. Further, this understanding will go a long way in explaining why the Court delayed correcting an opinion which gave aid and comfort to a system of censorship when it was busy eliminating far less oppressive controls on expression in other areas.[13]

A. In 1913 Ohio passed a motion picture censorship statute which required that all films shown within the state be submitted for prior review and licensing before a board of censors.[14] The Mutual Film Corporation, a distributor, sought to enjoin the enforcement of the statute on grounds that it (1) interferred with interstate commerce, (2) violated free speech under the Ohio Constitution, [15] and, (3) constituted an unlawful delegation of legislative powers. These arguments failed in the Ohio courts and the Supreme Court granted certiorari. Justice McKenna, for a unanimous court, likewise refused to overrule the censor. The free speech issue was settled by excluding motion pictures from the traditional protection given the press:

> We immediately feel that the argument is wrong or strained which extends the guarantees of free opinion and speech to the multitudinous shows which are advertised on the billboards of our cities and towns . . . and which seek to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion.[16]

But the Court was careful to add the reason why control was exercised. It was not merely because films were not protected that the state could act. Rather the danger for evil which the power of the screen exercised on the community gave the state its ground for licensing.[17]

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[12] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

[13] For a review of the work of the court in the area of free speech up to 1941, see Chafee, Free Speech in the United States (1941).

[14] 103 Ohio Laws, 1913, act 322.

[15] It should be noted that the speech issue touched only the Ohio constitutional guarantees, but later cases applied to the federal constitution as well. Fox Film Corp. v. Trumbull, 7 F.2d 715 (D. Conn. 1925).

[16] Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230, 243-44 (1915).

[17] *Id.* at 242, 244-45.

The question whether the Court was correct in its judgement that there was such a danger from movies can be raised, but in the context of the time there was sufficient conviction about the corrupting effect of cinema to prompt legislatures and municipalities to enact protective laws against it.[18] It was not for the Court to deny the reasonableness of these fears when the state came forward armed with the traditional argument for the protection of public morality.[19] Even as late as our own day there has been little scientific evidence either way on the so called power of movies over audiences.[20] The industry admitted at least the possibility when it came to the phase of self-regulation in the next decade. The grounds, then, on which the *Mutual Film* case had been decided were not insubstantial. But later use of the decision seemed to obliterate the fundamental point that films were unprotected only in a narrow and technical sense.

Motion pictures were not only a medium of expression but also a matter of property right. Indeed, the censor had been first attacked on the basis of denying property without due process of law.[21] Thus there were two rights which deserved protection, and in dealing with the films the courts may not have always been aware of this essential duality.[22] *Mutual Film* had denied free speech protection to movies, but that did not mean that films could be controlled unreasonably. Although not receiving the full constitutional guarantees of the first amendment,[23] motion pictures were expression and merited that protection which corresponded to their value to society. This value was admitted by the Court in its reckoning them as entertainment of a unique kind.

Beyond this level lay the property right to these communications which could also be invoked against arbitrary control

[18] For a history of film censorship in the United States, see Inglis, Freedom of the Movies, ch. 3 & 4 (1947).

[19] Whelan, *Censorship and the Constitutional Concept of Morality*, 43 Geo. L.J. 547 (1955), points out how the Court had established this principle in other areas and then applied it to speech.

[20] Hovland, Experiments in Mass Communications (1949); Inglis, Freedom of the Movies 21-22 (1947).

[21] Block v. Chicago, 239 Ill. 251, 87 N.E. 1011 (1909).

[22] After *Mutual Film* the courts seem to ignore the property basis of the right in particular. For arguments in favor of protection based on this right, see Note, 49 Yale L.J. 87 (1939). One of the few cases where a court alludes to this right is Schuman v. Picket, 277 Mich. 225, 269 N.W. 152 (1936).

[23] The *Mutual Film* decision had been extended to the federal constitution by later cases, see *supra* note 15.

which resulted in a destruction of their value. Later courts seemed to have assumed that once motion pictures were declared "unprotected," they were subject to the whim and fancy of any local critic.[24] But this was an abuse of *Mutual Film*, though one, perhaps, that was invited by the very system of control to which films were submitted.

The fact that the Court had approved a system of censorship by its decision does not seem to have startled any members of the Court itself into remonstrances. The reasons behind this apparent disregard of a traditional American bias against censors were several. Foremost was the fact that the Court had not yet applied the first amendment to state actions.[25] This application came only ten years later when the Court "assumed" that the rights of free speech were guaranteed against the state as well as against the federal govrnment.[26] But even after that, the Court still had not developed its theory of free speech sufficiently to include such peripheral areas as entertainment.[27] Another reason for the long delay in revising its determination in *Mutual Film* lay in the fact that the protection of movies had not been denied entirely but merely brought into balance with a real interest of the state to protect public morals.[28] This balance was to be judged by the state itself in the first instance and only where that judgment was clearly unreasonable would the Court interfere.[29] This deference to the state, to be sure, was more restricted in matters of speech,[30] but in this sensitive area not all the strictures of the first amendment were applied to state action.[31]

Thus it happened that the precedent in *Mutual Film* was to have a long life during a time when other restrictions on speech

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[24] For a listing of some of the more extreme examples of judicial concessions to the censor, see Kupferman & O'Brien, *Motion Picture Censorship—The Memphis Blues*, 36 Cornell L.Q. 273 (1951).

[25] As late as 1922 the Court had declared that the fourteenth amendment does not guarantee freedom of speech against state action. Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922).

[26] Gitlow v. New York, 286 U.S. 652 (1925).

[27] The Court first approached the subject when it passed on the mailing of Esquire magazine. Hannegan v. Esquire, Inc., 327 U.S. 146 (1946).

[28] See *supra* note 17 and accompanying text.

[29] The problem of judicial review of a censor's determination is treated *infra* pp. 454-55.

[30] Thornhill v. Alabama, 310 U.S. 88 (1940).

[31] The problem of how the first amendment is applied to the states is illustrated in Beauharnois v. Illinois, 343 U.S. 250 (1952). See Jackson, J. dissenting, *id.* at 287.

were quickly being dispatched.[32] But apart from the strictly constitutional grounds which seemed to support the decision, there were other extraneous reasons which tended to prolong the minority of motion pictures. Prominent among these would be the state of the industry itself. By 1920 the movie people realized that they had one successful method of warding off official control, and that was through a system of "self-control."[33] The developing techniques for keeping their own members in line with public sentiment finalized in the Production Code Administration [PCA],[34] through which the motion pictures were to win the respect of a large sector of the community. In the face of this responsibility shown by the industry, the birth of new boards of censors slowed considerably and finally stabilized at eight states and up to ninety communities.[35] Thus the industry had won the initial phase of its war and was satisfied to consolidate its achievements.

Yet another aspect of the interim years between *Mutual* and its retraction in 1952,[36] was the developing of the medium of motion pictures itself. By 1930 the use of sound had given the movies an added reason for being included in the ordinary acceptation of speech under the first amendment. Further, the growing awareness of the potentialities of film for more than mere entertainment resulted in movies of a controversial type, devoted to the exploration of social problems.[37] Behind all of this, however, lies the fact that Americans were coming to accept the screen for opinions on many things, perhaps a lamentable situation, but one nonetheless true. This function as conveyor of public opinion was to be the source of freedom for

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[32] For a review of the work of the Court up to 1941, see Chafee, Free Speech in the United States (1941).

[33] Inglis, The Freedom of the Movies, ch. 4 (1947).

[34] Shurlock, *The Motion Picture Picture Production Code*, 254 Annals 140 (1947).

[35] Florida, Kansas, Maryland, Massachusetts, New York, Ohio, Pennsylvania and Virginia. International Motion Picture Almanac 778 (1958). The number of communities actually enforcing censorship measures probably realized a high of ninety prior to 1952. See, Velie, *You Can't See That Movie: Censorship in Action*, Collier's, May 6, 1950, p. 11.

[36] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[37] In the area of race relations a series of movies ("Curley", "Pinkie", "Lost Boundaries", and "Native Son") came out after 1945 which stirred up controversy with the censors in segregated communities. See Kupferman & O'Brien, *supra* note 24. "Native Son" was banned by the Ohio censor in Superior Films, Inc. v. Department of Educ., 159 Ohio St. 315, 112 N.E.2d 311 (1953).

motion pictures, yet the basis on which some sort of state surveillance would also be placed.

B. After World War II the advent of foreign-made films created a new situation for motion picture censorship. Until now the industry had been solely located in Hollywood and controlled by a few large corporations. Movies issuing from there had been approved by the PCA officials and, although not always fully approved by the local censors, had behind them a tradition of acceptability. The mores established by the PCA had become a feature in American life and the activity of the censor could be pretty well predicted.[38] But when foreign films began to be shown on American screens a new element was interjected into the relations of censor and cinema. That element was the frank treatment of sex.[39] Movies which created no problem in countries where age-classification kept adult films for adults,[40] were cut or banned in America where audiences were unrestricted.[41] Indeed, the whole cultural difference between Europe and America was often summarized in a single film.

Joseph Burstyn, Inc. v. Wilson considered such a film.[42] Rossellini's "The Miracle," a bold attempt to deal with the problem

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[38] The techniques employed by the PCA in approving films were based on a close working relationship with the general practices of the film censors. For a description of these techniques, see Inglis, *op. cit. supra* note 33, at 151.

[39] Examples of this can be seen in the case of two foreign-made films banned by local censors but upheld by the Court. In Commercial Pictures v. Regents, 346 U.S. 587 (1954), the French film "La Ronde" was refused a license for its treatment of sexual promiscuity. On the same general grounds another French product, "The Game of Love," was refused a license in Chicago. Times Film Corp. v. Chicago, 355 U.S. 35 (1957). Another recent example of resistance to the French style of sex in movies is the banning of "The Lovers." Zenith Int'l Films Corp. v. City of Chicago, 291 F.2d 785 (7th Cir. 1961). For an examination of this decision, see *infra* note 161 and accompanying text.

[40] For a comparative study of the various film censorship laws of France, Germany and the United States, see Castberg, Freedom of Speech in the West (1960).

[41] Age classification in the United States has suffered two set-backs. Paramount Film Distribution Corp. v. City of Chicago, 172 F. Supp. 69 (N.D. Ill. 1959) and William Goldman Theatres, Inc. v. Dana, 405 Pa. 83, 173 A.2d 59 (1961). In this latter decision the age-classification section of the Pennsylvania Motion Picture Control Act, while not directly ruled on, perished in the invalidation of the law as a whole. But see the comments of the court, *id.* at 90, 173 A.2d at 66.

[42] 343 U.S. 495 (1952). The film was the story of a young peasant girl of less than normal intelligence who while intoxicated is raped by a stranger. The child that she conceives she believes to be a miracle and that the stranger was St. Joseph. Her illusion is held up to scorn by her fellow townsmen but she bears it with constancy. In the end she bears her child with great joy because it represents the object of her belief and love. The intended parallel between the story and the biblical account of the conception and birth of Christ is easily seen.

of human love, was the cause of bitter protest among New York audiences, especially Catholics, on grounds that it was sacrilegious.[43] The fact that it had been shown in Italy without antagonizing the religious sensibilities of Italian Catholics pointed to the complexity of the problem of trying to censor films on religious grounds. The license originally issued was revoked on judgment by the Regents of New York that the movie was "sacrilegious."[44] Appeal was taken to the New York courts where the decision of the Regents was upheld.[45] In granting certiorari the Supreme Court indicated a willingness to reconsider the long-standing precedent of *Mutual Film.*

The issue of church-state, implicit in the case,[46] was bypassed, the Court no doubt feeling that the speech issues presented sufficient complications. For a unanimous Court, Justice Clark confirmed the contention of the plaintiff that motion pictures were protected by the first and fourteenth amendments.[47] *Burstyn* became a land-mark in the progress of the industry toward full status as a medium of communication. But the Court refused to go much further than a bare declaration of emancipation. How far this protection ran no one knew for sure. Two things were clear, however. First, it was evident that the standard of "sacrilegious" was too vague to supply the protection newly enunciated. Second, the real issue of whether any prior censorship of movies was constitutional, was expressly reserved.[48] This surely indicated that the Court was not convinced that prior restraint on films was altogether invalid. But from the opinion itself one could not tell whether the negative pregnant could thereby be safely followed, *i.e.,* that some censorship would be allowed.

At one point in the opinion this supposition seemed well

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[43] See concurrence of Frankfurter, J., Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495, 507 (1952).

[44] The film had been approved by the Motion Picture Division in November 1950. It had run for about eight weeks before it was recalled for review by the Regents of the University of New York, the appeal board for the Motion Picture Division. Their decision is final and the movie distributor is free to appeal to the courts for review.

[45] Joseph Burstyn, Inc. v. Wilson, 278 App. Div. 253, 104 N.Y.S.2d 740 (1951); *aff'd* 303 N.Y. 242, 101 N.E.2d 665 (1951).

[46] See the brief amicus curiae of the American Jewish Congress arguing this ground, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[47] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[48] *Id.* at 505-06.

founded for Justice Clark alluded to the matter of obscenity as a possible ground on which the censor could be justified. As yet, of course, the Court had not come to grips with the constitutional problem of obscene expression, but certain dicta in past cases indicated the direction in which they were tending.[49] Constitutionally, the exception of obscenity still rested on the basis established in *Mutual Film*, that is, that the state had a right to protect public morality. And it remained the "capacity for evil" that was the relevant factor in determining the scope of control. Since obscenity was considered to be such a danger-laden type of expression, it could be subject to proportionate control. But the curious aspect of this suggestion in the context of the case was the almost intrinsic vagueness that clung to the term "obscenity." By comparison, the term "sacrilegious," condemned at length by Justice Frankfurter,[50] seemed far more definite.

Perhaps the key to the future lay in the six line concurrence by Justice Reed where he pointed out the duty of the Court in regard to the new freedom of the movies:

> Assuming that a state may establish a system for the licensing of motion pictures, an issue not foreclosed by the Court's opinion, our duty requires us to examine the facts of the refusal of a license *in each case* to determine whether the principles of the First Amendment have been honored. (Emphasis added.)[51]

This remark contained a prediction of how the Court was to implement the franchise given to the movies. The case-by-case technique which characterizes a fourteenth amendment due process application by the Court was clearly suggested. It was thus that the cinema was to receive its protection and the censor brought under control of constitutional principles. It also would provide an interim method of correcting errors before more general principles could be formulated.

C. Where the Court in exercising its certiorari jurisdiction makes use of per curiam reversals, its purposes have been interpreted to mean that the decision below was clearly erron-

[49] Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942); Near v. Minnesota, 283 U.S. 697, 716 (1931).
[50] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 507 (1952).
[51] *Id.* at 506-07.

eous.[52] If that may be accepted as a reasonable hypothesis in most cases, its application to the film censorship decisions following *Burstyn* is unsatisfying. In each of the five cases handled by per curiam reversal, the highest state or federal court had upheld the censor almost without dissent.[53] It seems unreasonable to say that all these judges were guilty of clear error. This is especially true since the implications of *Burstyn* had not been clearly spelled out, leaving to the lower courts a melange of new and old by implying that *Mutual Film* was not entirely off the books.

A more likely supposition than "clear error" for the use of these per curiam reversals in the film cases was the essential lack of agreement among the members of the Court.[54] While all had agreed that the motion pictures deserved protection, no one agreed where the line should be drawn. In *Burstyn* the line seemed to be no broader than the single term "sacrilegious," although the principle of vagueness suggested that the method to be followed was a due process one of weighing the conflicting interests involved. That was opposed to the first amendment technique promoted by Justices Black and Douglas.[55] They would simply apply the strictures of the first amendment to all state action. Unless there was an exception under a narrow application of the clear and present danger test, no control on speech was permitted. But such a suggestion went against the underlying reason for allowing state control in the first place. If the states were to be equated with Congress as enunciated in the first amendment and movies were protected speech, then reservation of the question of prior censorship in *Burstyn* made no sense. Justice Douglas implied this very thing when he read *Burstyn* as saying that all censorship was outlawed.[56] How he managed to interpret Justice Clark's clear statement to the contrary is uncertain. But it was evident that he was taking a posi-

[52] Stern & Gressman, Supreme Court Practice 155-56 (2d ed. 1954).

[53] Times Film Corp. v. City of Chicago, 244 F.2d 432 (7th Cir. 1957); Holmby Prods., Inc. v. Vaughn, 177 Kan. 728, 282 P.2d 412 (1955); Commercial Pictures Corp. v. Regents of New York, 305 N.Y. 336, 113 N.E.2d 502 (1953); Superior Films, Inc. v. Department of Educ., 159 Ohio St. 315, 112 N.E.2d 311 (1953); Gelling v. Texas, 157 Tex. Crim. 516, 247 S.W.2d 95 (1952).

[54] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 20-21 (1959).

[55] Superior Films, Inc. v. Department of Educ., 346 U.S. 587, 588 (1954).

[56] Gelling v. Texas, 343 U.S. 960 (1952).

tion on the undecided issue that was opposed to the case-by-case method offered by Justice Reed.

The meaning that these five per curiam decisions have in the light of later events is not of great importance. They contained no explicit pronouncement of doctrine beyond a few short concurrences. But they do represent a determination by the Court to stand by its commitment to moving pictures. They also show a progressive need to reach an agreement before the judicial process cracked under the strain of silence.

Burstyn had condemned standards which were too indefinite to provide a proper guide to censors. This same theme seems traceable throughout the next five cases. In *Gelling v. Texas*[57] the censor could ban any film which was "not in the best interests of the people of said city." A clearer invitation to arbitrate the tastes of a community could hardly be devised. In *Superior Films, Inc. v. Department of Educ.*[58] the standard, already once approved for Ohio in *Mutual Film,* was also suspect of easy abuse. It ordered the censor to issue a license to all films of a "moral, educational or amusing and harmless character."[59] Although having greater exactitude than Texas required, Ohio's statute seemed to leave ample room for arbitrary action. A New York law, on the other hand, prohibited license to any film which was "immoral . . . or is of such a character that its exhibition would tend to corrupt morals."[60] This standard seemed much more narrowly confined, but the Court reversed a decision under it in *Commercial Pictures Corp. v. Regents of New York.*[61] Doubt begins to enter here as to the extent the Court was willing to carry its stricture on vagueness when it had itself suggested obscenity as a ground for a constitutional standard. Kansas, too, found itself reversed in *Holmby Prods. Inc. v. Vaughn*[62] where its standard of "obscence, indecent and immoral, and such as tend to debase or corrupt morals," was impugned. Finally, the Court reversed a federal appellate court's holding that Chicago

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[57] *Ibid.*

[58] 346 U.S. 587 (1954).

[59] See, *supra* note 16 and accompanying text. This law was declared unconstitutional by the Ohio courts following the decision in the *Superior Films* case. R.K.O. Radio Pictures, Inc. v. Department of Educ., 162 Ohio St. 263, 122 N.E.2d 769 (1954).

[60] N.Y. Educ. Law. §122 (a).

[61] 346 U.S. 587 (1954). (companion case to *Superior Films*).

[62] 350 U.S. 870 (1955).

had correctly applied its standard of "obscene" to the movie "Game of Love."[63] Again it is difficult to tell whether vagueness is a legitimate factor in a decision where obscenity is involved. Perhaps the Court was suggesting that it had gone down to the actual application of the standard rather than the standard itself when it cited the *Alberts* case[64] in its last decision. Whatever was implied in these silent reversals, the Court was definitely straining to formulate some sort of answer to the riddle of censorship of protected free speech.

D. While motion pictures were winning free speech protection, another area of expression was being denied it. In 1957 the Court had squarely met the obscenity issue and determined that this type of speech was not included in the guarantees of the first and fourteenth amendments.[65] Like any Supreme Court decision, *Roth* raised as many problems as it settled. While it was clear that obscene speech was not protected, there were few indications where the wall of protection ended, and how. Since it was a matter of speech, the Court was careful to say that the unprotected area was very narrow. But where the metes and bounds were to be set up and by whom was left an open question.[66]

All of this directly affected the movies. By now it had become clear that obscenity was a cognate issue in almost every case of film censorship. Until the matter of obscenity was itself cleared up, the motion pictures would suffer accordingly. After *Roth* there was a little more light to guide the confused state legislatures, even if there were few interested in revamping film censorship laws that had suffered silent defeats by the Supreme Court.[67]

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[63] Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957) (not to be confused with case of same title decided by the Court in 1961, 365 U.S. 43).

[64] Alberts v. California, 354 U.S. 476 (1957). In this case the Supreme Court had formulated a narrow test for obscenity (see *infra* note 102 and accompanying text). But the test applied in Illinois at the time was at least as narrow. See, American Civil Liberties Union v. City of Chicago, 3 Ill.2d 334, 347, 121 N.E.2d 585, 592 (1954).

[65] Roth v. United States, 354 U.S. 476 (1957).

[66] See, Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. Rev. 1-45.

[67] Besides Ohio, *supra* note 59, Pennsylvania had also invalidated their movie censorship act. Hallmark Prods., Inc. v. Carroll, 384 Pa. 348, 121 A.2d 584 (1956). But in 1959 it passed an entirely new act. Pa. Laws 1959, act 358. For its recent invalidation, see *infra* note 167 and accompanying text.

In Kingsley Int'l Pictures Corp. v. Regents of New York,[68] the Court was faced with this "issue within an issue" by accepting for review a film which New York had condemned as obscene. The interesting aspect of the case was that the film was based on D. H. Lawrence's novel "Lady Chatterley's Lover," a piece of literature devoted to the advocacy of unconventional ideas on sex in language and scenes even more unconventional. Thus the whole complex nature of the obscene was before the Court, *i.e.*, an expression which contained elements of the seductive, the offensive and the ideological.[69] The question was whether speech that dealt with sex on the level of ideas could lose its status of protection if it chose a means of expression that might offend some and corrupt others.[70]

The film had lost a close fight in the New York courts.[71] In the Court of Appeals, Chief Judge Conway made a classic statement for the protection of public morality through censorship of films. He had carried a bare majority, although the judges in dissent were not in agreement.[72] This pattern of confused disagreement found its way into the United States Supreme Court. Justice Stewart spoke for a unanimous court, but he represented, in fact, only three justices. Two justices expressed no opinion.[73] The other four expressed different reasons for concurring in the conclusion reached by the Court.

What New York had said in its newly clarified standard of "immorality,"[74] Justice Stewart believed, was nothing less than the prohibition of ideas which go against accepted customs of sex morality in that state. This meaning was drawn from the interpretation made of the statute by the Court of Appeals. When Chief Judge Conway spoke of immoral films he seemed to in-

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[68] 360 U.S. 684 (1959).

[69] Chafee, Government and Mass Communications 211 (1947).

[70] Prof. Kalven feels that offense to adult, voluntary audiences is never a ground for control. *Supra* note 66, at 42.

[71] Kingsley Int'l Pictures Corp. v. Regents of New York, 4 App. Div. 2d 348, 165 N.Y.S.2d 681 (1957); *rev'd* 4 N.Y.2d 349, 175 N.Y.S.2d 39 (1958).

[72] Judges Fuld, Dye and Van Voorhis dissented in separate opinions.

[73] Chief Justice Warren and Justice Brennan expressed no opinion in the case.

[74] N.Y. Educ. Law §122(a) provides:

> [T]he term 'immoral' and the phrase 'of such a character that its exhibition would tend to corrupt morals' shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewedness, or which expressly or impliedly presents such acts as desireable, acceptable or proper patterns of behavior.

clude those which were immoral in theme only.[75] Thus the advocacy of ideas was expressly threatened and the law was invalid under the first and fourteenth amendments. Whether the New York court had really intended to say this is debatable, but the distinction which Justice Stewart had drawn suggested the difficulty of separating advocacy and portrayal of sexual immorality. Further it was an open invitation to Justice Harlan to elaborate on a theme which he had dealt with in *Yates v. United States*.[76] That this justice did not take up the work on the nature of advocacy he had begun earlier in the context of Communism does not deny the relevancy of Justice Stewart's challenge.

What Justice Harlan did say,[77] joined by Justices Frankfurter and Whitaker, was that New York's law did not forbid ideas. The purpose of the law was to eliminate incendiary films from the New York theatres. Thus portrayal and not advocacy was forbidden. This was directed at Justice Stewart. Against the position of Justices Black and Douglas that the first amendment outlawed all censorship,[78] Harlan proposed that a due process technique was in order. It was on a case-by-case examination of the application of standards to specific films that the Court would spell out the protection afforded the movies by *Burstyn*, not by a whole-sale foreclosure of the issue. Behind such an approach lay the feeling that methods of dealing with the problem of obscenity were not to be struck from the states' hand on mere conviction that such methods were unwise.

In answer to such a proposition of procedure, Justice Black made a perceptive objection.[79] As far as he could see the technique suggested by Justice Harlan and company had the effect of turning the Court into a Supreme Board of Censors. If each application of standards of obscenity to the film in question was to be examined, then the determination of that issue ultimately lay with the Court and not with the local community where—if anywhere at all—it belonged.

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[75] "It embraces not only films which are visually suggestive and obscene, nor only those which are *sexually suggestive and immoral in theme*, but those which combine the two." (Emphasis added.) Kingsley Int'l Pictures Corp. v. Regents of New York, 4 N.Y.2d 349, 351-52, 175 N.Y.S.2d 39, 40 (1958).

[76] 354 U.S. 293 (1957).

[77] Kingsley Int'l Pictures Corp. v. Regents of New York, 360 U.S. 684, 702 (1959).

[78] *Id.* at 690, 697.

[79] *Id.* at 690.

However the Justices would be finally reconciled, the real issue at the heart of the case was again by-passed. Whether the prior licensing of films was in itself unconstitutional was the question which all the motion picture litigants had asked the Court. For seven times, now, the answer had been quietly shelved. There were always other grounds to give the movie people the victory but not the war. They felt that the *coup de grace* could only be administered if that issue alone were before the Court. This became the main task of the lawyers who were directing the fortunes of the motion picture interests.

E. The distinction between restraint on speech that is prior to publication and that which follows publication has a long history in American law.[80] The Court had spoken of the distinction in the *Near* opinion, written by Chief Justice Hughes,[81] giving it an established place among principles of constitutional interpretation. But question had been made of the usefulness of such a distinction if the analysis of the factual situation stopped at the level of mere identification of a restraint as prior.[82] A more realistic approach had been adopted by the Court in a later opinion[83] where the majority had said that the test was the pragmatic assessment of the actual restraining effects on speech exercised by the control in question, not the mere fact that it was either prior or subsequent.[84]

With this recent decision in mind, plus a clear indication by the Court of its reluctance to deal with the issue of prior restraint on films, the lawyers for the motion picture litigants should have been reasonably warned that the decision might go against their clients. But they continued to believe that popular opinion against censors would ultimately be determinative of the constitutional issue. Still one wonders why the Court granted certiorari in a case where the issue of prior restraint had been achieved at the sacrifice of a concrete case. In consenting to review *Times Film Corp. v. City of Chicago*[85] the Court was apparently violating its freedom to choose among issues.[86]

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[80] See, Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Prob. 648 (1955).

[81] Near v. Minnesota, 283 U.S. 697 (1931).

[82] See, Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533 (1951).

[83] Kingsley Books v. Brown, 354 U.S. 436 (1957).

[84] *Id.* at 441.

[85] 365 U.S. 43 (1961).

The facts of the case were as follows. The plaintiff distributor had sought a license from the Chicago censors, tendering the fee but refusing to submit the movie for review. His grounds were that such a prior review was an unconstitutional restraint on speech protected by the first and fourteenth amendments. The lower federal courts were unimpressed by this argument and could discover no justiciable issue but only an "abstract question of law."[87] Since the film was before the courts in name only (provocatively entitled "Don Juan"), the ordinance in question had not been applied and could not be challenged. Until a license had been denied on the basis of the law in question, the case remained entirely theoretical.

But the Supreme Court discovered the controversy in the very right of the city to condition the issue of a required license on the basis of submission of a film for review by the censors.[88] Or as Justice Clark framed it: "Whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture."[89] Put in those terms, (ones used by counsel for the plaintiff), the decision of the issue was less difficult than it might have been since the theoretical nature of the case allowed the Court to hypothesize the vilest sort of film which would in turn justify prior censorship. The abstract attack on the Chicago ordinance left that statute unconsidered in the case since the injury was done by the implimentation of the very purpose of the law, not by the application of standards set out in its sections.

A majority of five justices held that the issue as it was framed by Justice Clark had to be answered in the negative. Did that mean that the Constitution approved of censorship? Only in the limited and negative sense that not all prior control on motion pictures was denied the state.

Justice Clark began by reiterating that the freedom of speech is no absolute right. Further, even as to the use of prior restraints there were exceptional cases, of which obscenity was one, where this form of control was allowable. The determin-

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[86] See, Bickel, *The Passive Virtues: Foreword to The Supreme Court, 1960 Term*, 75 Harv. L. Rev. 40, 57-58 (1961).

[87] Times Film Corp. v. City of Chicago, 272 F.2d 90 (7th Cir. 1959).

[88] *Cf.* Staub v. City of Baxley, 355 U.S. 313 (1958).

[89] Times Film Corp. v. City of Chicago, 365 U.S. 43, 46 (1961).

ation of the issue of prior restraint was a matter of pragmatic assessment. To affirm the plaintiff's case would be to say that the Constitution limits the state to one method of control on all speech, even that unprotected by the Constitution itself. This is not to assert that censorship may be unlimited, but only that in the case of motion pictures and under the attack made here against prior licensing, censorship is not invalid.

The opinion left many questions unanswered, but it was clear that the Court was going to continue to pursue it's case-by-case method of review of film censorship litigation. It refused to settle the issue by ruling out all prior control. Had the majority gone the other way, they would have read out of the Constitution all possible use of prior control in any form, a reading that would seem to contradict the exceptions in *Near*.[90]

Chief Justice Warren dissented in a long opinion[91] which summarized much of the free speech litigation over the past thirty years since the *Near* decision,[92] in which prior restraint was first clearly impugned as an invalid means of control. The force of his argument was simply that prior licensing of motion pictures was censorship and this form of control had always been condemned by the Court. He went on to show the dangers involved in establishing a censor in power and pointed out how the Chicago ordinance worked grave hardships on the free expression of ideas through films. It was here that he seemed to reframe the issue in the case. For him it was not a question of whether the Constitution allowed one free showing to every film, but whether the Constitution allowed censorship.[93] The majority had decided that it did and, in giving no principle on which to distinguish the various media, had made its answer into a general approbation of prior control of all speech.

The grounds for disagreement on the issue of the case derived from its hypothetical character. The plaintiff was challenging all systems of prior licensing for films and in so doing had to sacrifice a particularized attack on the Chicago statute. The issue thus presented had an advisory flavor. It spoke in terms of "all cases" and allowed for no limited interpretation of the

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[90] Near v. Minnesota, 283 U.S. 697, 715-16 (1931).
[91] Times Film Corp. v. City of Chicago, 365 U.S. 43, 50 (1961).
[92] Near v. Minnesota, 283 U.S. 697, 715-16 (1931).
[93] Times Film Corp. v. City of Chicago, 365 U.S. 43, 55 (1961).

Constitution. When the majority attempted to so limit its answer to some sort of obscenity exception the dissent challenged its right to do so. Indeed, such a limitation would be impossible if the question had only a "yes" or "no" answer. That the Court refused to give such an answer even the motion picture people were later willing to concede.[94] But some sort of answer had to be given and the principle that grounded the affirmation of prior licensing was not entirely clear.

Justice Clark clearly saw the force of the criticism which the Chief Justice leveled against the majority opinion, that it contained an implicit condonation of the *principle* of censorship as constitutionally permissible. Some principle for justifying prior restraint for motion pictures alone, and even there in a limited area, was necessary. Returning to his earlier opinion in *Burstyn* he said:[95]

> We recognized in *Burstyn* that 'capacity for evil . . . may be relevant in determining the permissible scope of community control,' and that motion pictures were not 'necessarily subject to the precise rules governing any other particular method of expression. Each method, 'we said,' tends to present its own peculiar problems.

As a constitutional principle this seems to be no more than an assertion that the Court will pursue a due process technique of balancing the interests of freedom and public morality where films are involved.[96] Because of the particular features of each medium of communication and the specific problems that each creates, the Court will withhold judgment on each one until they come individually before the Court. Unfortunately the Court did not elaborate the principle announced and left for a later day a fuller articulation of the dimensions which it contained.

Thus the status of motion pictures after ten years of litigation was anomalous. Films had been recognized as a medium for the expression of ideas and included within the protection of the first and fourteenth amendments. But this freedom did not rule out the use of prior censorship to control expressions found

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[94] N.Y. Times, Jan. 14, 1961, p. 20, col. 6.

[95] Times Film Corp. v. City of Chicago, 365 U.S. 43, 49 (1960).

[96] The "peculiar problems" concept can be traced back to the concurring opinion of Jackson, J., in Kovacs v. Cooper, 336 U.S. 77, 97 (1949). For a critique of the use of this method, see Kauper, The Constitution and Civil Liberties 85-86, 111-26 (1962).

to be dangerous to the community. How wide the scope of such control was the Court had not definitely said, but it had narrowed it effectively through a series of decisions which pointed to obscenity as the only permissible grounds for review. Further, in withholding a final elimination of the censor, the Court promised to continue its case-by-case review of the application of this narrow standard.

II.

In gradually articulating the general norms laid down in the *Times Film* decision, the Court must surely face the issue of obscenity. In each of their opinions on film censorship, obscenity has been mentioned as one possible ground on which prior licensing might be valid.[97] Therefore it will be helpful to examine the nature of this type of expression, its peculiar aspects when used in movies, and the control of it by prior censorship.

A. In *Roth v. United States*[98] the Court held that obscene speech was not protected under the first and fourteenth amendments.[99] But this decision did not end the problem of the Court for it left open questions as to the determination of the issue in each case, the procedural safeguards required and the type of review which will be made.[100] What Justice Brennan had said in his majority opinion in *Roth* was that obscene speech has been traditionally regarded as socially worthless and not protected by free speech guarantees.[101] He went on to define the test for obscenity as: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[102] But even after he had gone this far, there still remained the problem as to the application of this test to the expression in question. Since the key word of "obscenity" had been merely replaced by

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[97] Times Film Corp. v. City of Chicago, 365 U.S. 43, 49 (1961); Kingsley Int'l Pictures Corp. v. Regents of New York, 360 U.S. 684, 688 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952).

[98] 354 U.S. 476 (1957).

[99] The *Roth* case dealt with a federal mailing statute and thus directly involved the first amendment. The companion case, *Alberts v. California*, was a state obscenity action and was contested on grounds of violation of the fourteenth amendment.

[100] Marcus v. Search Warrant of Property, 367 U.S. 717 (1961); Smith v. California, 361 U.S. 147 (1959).

[101] Roth v. United States, 354 U.S. 476, 484-85 (1957). For a commentary on the doctrine of "social utility" as applied to speech, see Kalven, *supra* note 66.

[102] Roth v. United States, 354 U.S. 476, 489 (1957).

another key word, "prurient," the core meaning of the term may still leave room for a variety of interpretations.[103] It was this element of uncertainty in matters of speech which seemed intolerable to Justices Black and Douglas.[104]

While the majority emphasized the worthlessness of obscene speech, Justice Harlan[105] chose a somewhat different ground for allowing it to be controlled. Since states are interested in fostering proper attitudes toward sex in relation to marriage, the evil inherent in obscene communications provides a legitimate basis for its control. Thus the non-protection is more a matter of averting an evil than in judging the value of speech.[106] It is true that many have disputed the nature of the evil involved in obscenity[107] and whether it provided a valid occasion for state action, but until there was evidence against the traditional argument from common sense that obscenity was corruptive of morals, legislatures could continue to act.[108] Perhaps Justice Brennan had simply tried to by-pass the dispute over the nature of the evil involved when he suggested that obscenity was worthless and therefore could be controlled.

Because of the highly complex nature of the obscene,[109] there is need that the determination in each specific case be closely scrutinized. This scrutiny, suggested Justice Harlan,[110] is a matter of a delicate constitutional judgment. The issue in each case is not "What is obscenity?," but rather "Is *this* item obscene?" This is not only a factual determination but a matter of constitutional interpretation.[111] It will be necessary for the Supreme Court to continue vigilance in these cases since the local determination of the issue may be in excess of the narrow limits set down.

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[103] Kalven, *supra* note 66, at 15.
[104] Roth v. United States, 354 U.S. 476, 508 (1957).
[105] *Id.* at 496.
[106] See Frankfurter, J., dissenting in Winter v. New York, 333 U.S. 507, 520 (1948).
[107] Compare Frank, J., concurring, United States v. Roth, 237 F.2d 796, 801 (2d Cir. 1956) with Schmidt, *A Justification of Statutes Barring Pornography from the Mail*, 26 Ford. L. Rev. 70 (1957).
[108] Roth v. United States, 354 U.S. 476, 501-02 (1957).
[109] Chafee, *op. cit. supra* note 69.
[110] Roth v. United States, 354 U.S. 476, 498 (1957).
[111] *Id.* at 497. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. Rev. 1, calls the issue of obscenity a constitutional fact which the court is free to review de novo, at 20-21.

This raises a problem which is inherent in the very nature of obscenity. By definition the Court has indicated that the question of obscenity is local by allowing it to be settled according to "community standards."[112] This means that the judgment of the community as to what its standards are is a controlling factor in saying what is obscene. But if this is to be subject to a de novo type of review by the higher courts, then the final determination rests with these courts and not with the local community. If, as Justice Black charges,[113] the whole business of obscenity is a matter of subjective prejudice anyway, then it will be the prepossessions of the Supreme Court which will be final arbiter of the control allowable to the state.

But the Court has not insisted on a review of the local judgment on the basis of a de novo determination of the issue. Rather the review has looked to the procedural guarantees that the determination was really a matter of local standards.[114] There was a series of cases, however, which the Court reversed per curiam.[115] but two of these involved federal mailing statutes and thus did not depend on a determination of a local community.[116] The third, the *Times Film* case of 1958, did seem to be an arbitrary reversal of an opinion supposedly based on community standards. However, the Court was dealing here with a case of censorship and may have felt that the issue had not been fairly determined.[117]

B. The peculiar nature of the medium involved gives obscenity a variety of aspects. Thus mail-order obscenity tends to be of a particularly scabrous type, reaching many young people

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[112] Roth v. United States, 354 U.S. 476, 489 (1957). The court has indicated that it will demand some proof that community standards have been met. Smith v. California, 361 U.S. 147 (1959). See also, Zenith Int'l Film Corp. v. City of Chicago, 291 F.2d 785 (7th Cir. 1961); Portland v. Welch, 364 P.2d 1009 (Ore. 1961).

[113] See Justice Black concurring in Smith v. California, 361 U.S. 147, 155 (1959).

[114] *Supra* note 112.

[115] Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958); One, Inc. v. Olsen, 355 U.S. 371 (1958); Times Film Corp. v. City of Chicago, 355 U.S. 35 (1958).

[116] Thurman Arnold has suggested that the use of per curiam reversals of obscenity cases is entirely legitimate because the court decides on the basis of a non-reasoned judgment that does not admit of elaboration. See, Kalven, *supra* note 111, at 42-44.

[117] The Pennsylvania film censorship law was successfully attacked for lack of a jury determination of the issue of obscenity. See *infra* notes 167-75 and accompanying text.

directly.[118] The problem of book-store sales of obscene works has a different shading than the same problem when it arises in the context of the motion pictures. Even here, there is a variety of types that go from the pornographic stag reels to the artful foreign film. If the Court is to adhere to its announced principle of "pragmatic assessment" of the factual implications of each case, all these particular shadings must be part of the ultimate determination. That is why the unarticulated major premise of the *Times Film* decision that every medium of expression has its own peculiar problems has to be filled out with a brief examination of some of the peculiarities of moving picture obscenity.

Since the *Mutual Film* opinion of Justice McKenna, there have been admissions by the Court that films create problems of their own.[119] These have tended to be summed up in the term "impact" of motion pictures. Although the Court itself has not dilated on this problem, briefs for various appellees have brought out a number of facets.[120] The opinions of other courts have also explicated the dangers involved in film portrayal of sexual themes.[121] It must be admitted, however, that there is much more assertion than evidence about the dangers of films, as the industry has pointed out.[122] But a brief summary of several of the more evident facts about motion pictures will serve to point up the differences in this type of obscene communication.

The primary characteristic of moving pictures is there use of simultaneous audio-visual images. This gives the experience which they convey an immediacy which other media lack. Thus the film does not depend on the active participation of its audience nor require of it the necessary preparation of literacy for its fundamental reception. This combination of passivity and low intellectual requirements has proven a successful formula

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[118] Kilpatrick, The Smut Peddlers (1960).

[119] Kingsley Int'l Pictures Corp. v. Regents of New York, 360 U.S. 684, 691 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952); Times Film Corp. v. City of Chicago, 365 U.S. 43, 49 (1951); Mutual Film Corp v. Industrial Comm'n, 236 U.S. 230, 241-42 (1915).

[120] Brief for Respondent, Joseph Burstyn, Inc. v. Wilson, *id.*; Brief for Respondent, Kingsley Int'l Pictures Corp. v. Regents of New York, *id.*

[121] Regents of New York v. Kingsley Int'l Pictures Corp., 4 N.Y.2d 349, 175 N.Y.S.2d 39 (1958); Excelsior Pictures Corp. v. Regents of New York, 3 N.Y.2d 237, 248, 165 N.Y.S.2d 42, 51 (1957).

[122] See, Brief of Motion Picture Ass'n of Am., Inc. as Amicus Curiae, pp. 18-22; Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).

for any medium of mass entertainment. The various technical advances since the inception of the film industry have only gone to underline the original quality of immediacy. Thus the use of sound and color have helped bring the cinema into closer verisimilitude with life itself, even in some cases passing beyond the limitations of ordinary perception and reproducing a world of startling effects.[123]

Thus to pose the problem of obscenity in this context is to raise a unique question as to the power of artistic re-creation of human experience. The question of equality among the media of expression as far as constitutional protection goes is cast in a different light by a consideration of the vast differences that separate the media and their communication. This feeling is shared by the film industry itself and expressed in the need it experienced to establish some intra-industry regulation. The influence that motion pictures have, beyond the mere physical impact described above, derives from other social factors which make films a uniquely American institution.[124]

There are at least two problems which the law faces in dealing with film obscenity. The first is the meaning of advocacy of ideas in the context of motion pictures. The second is the fact that young people constitute a major part of the screen audience.

The operative distinction in the *Kingsley Pictures* case,[125] was that made between the portrayal and the advocacy of sexually immoral acts.[126] Justice Stewart felt that New York had forbidden movies to advocate unconventional ideas about sexual morality when it refused to issue a license to a film which proposed adultery as a proper pattern of behavior.[127] Justice Harlan interpreted the Court of Appeals as saying that it simply outlawed the portrayal of such acts.[128] There seems to be ground for both sides

[123] See, Kracauer, Theory of Film 164 (1960). Perhaps the difficulty the Court has experienced in dealing with films is the fact that they are as yet very little understood. The complexity that comes out of a book like Kracauer's is in strange contrast to the simplistic description found in briefs for both sides of any film censorship case. The decision of *Times Film* seems to be no more than a reflection by the Court of this feeling of frustration in dealing with an unknown.

[124] For an analysis of some of the reasons why people attend films, see David & Evelyn Reisman, *Movies and Audiences*, 4 Am. Q. 195-202 (1952).

[125] Kingsley Int'l Pictures Corp. v. Regents of New York, 360 U.S. 684 (1959).

[126] *Id.* at 688-89.

[127] For the wording of the New York statute, see *supra* note 74.

[128] Kingsley Int'l Pictures Corp. v. Regents of New York, 360 U.S. 684, 705-06 (1959).

in the wording of the opinion by Chief Judge Conway.[129] But the question is whether the advocacy of ideas about sex takes on a different complexion when the advocacy is done with images.

The prohibition against obscenity was strictly limited by the *Roth* opinion to make room for a legitimate discussion of sex.[130] This discussion will include treatment of sex in the novel and the other art forms. But as one moves away from the discussion of sex to the portrayal of sex by the artist, different problems are raised. While a lecturer depends on the rational content of his subject as he talks on the nature of sex, no such supposition is made by the artist. For him the purpose is to use the emotions to carry an experience. Thus the treatments of sex by the two persons, although broadly within the same category of expression of ideas, are widely different. When one adds to this difference the dimensions of portrayal that constitute a film version of a novel treating of sex, the problem undergoes yet a more drastic change. Consider the result if a motion picture were to be entirely faithful in reproducing a novel. "Lady Chatterley's Lover" taken from between hard covers and put in detail upon the screen would have been in flagrant violation of permissible frankness.

Yet the problem remains. Can movies advocate ideas in the area of sex or not? The answer must be yes. But the difference between a legitimate advocacy and a lurid portrayal may not always be an easy decision to make.

A further complicating factor in determining the exact nature of motion picture advocacy of ideas dealing with sex is the nature of the audiences involved. Chief Justice Warren has suggested that the audience to which obscenity is directed plays an important part in determining whether items are in fact obscene.[131] This becomes clearer when placed in the context of advocacy where incitement may be determined on the basis of the effect on the audience.[132] The fact that movies play to large teenage audiences may have been behind an unwillingness on the part

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[129] Regents of New York v. Kingsley Int'l Pictures Corp., 4 N.Y.2d 349, 175 N.Y.S.2d 39 (1958). Justice Clark sided with Justice Stewart. Kingsley Int'l Pictures Corp. v. Regents of New York, 360 U.S. 684, 699 (1959).

[130] Roth v. United States, 354 U.S. 476, 487 (1957).

[131] *Ibid;* Kingsley Books, Inc. v. Brown, 354 U.S. 436, 445 (1957).

[132] Yates v. United States, 354 U.S. 298 (1957); Schenck v. United States, 249 U.S. 47 (1919).

of the Court to immediately eliminate prior censorship once motion pictures were raised to first amendment status. Although it would seem to be unconstitutional to impose a juvenile standard of obscenity on the community as a whole,[133] still the wide appeal of cinema to young people makes the use of age classification, at least, a legitimate alternative to full censorship.[134] But whether it is valid to consider the impact of the advocacy of ideas on sex by movies when the audience contains a majority of minors remains an unanswered question.

C. The personal sins of the censor are too well known to bear repeating here. Everyone knows the long list of victims that have been the legacy of such a system of control.[135] That motion picture licensing as it is practiced in the United States constitutes such a system of control is beyond doubt.[136] But analysis can not end there. It must, in the words of the Court,[137] go on to a "pragmatic assessment" of the factual derogation of freedom. In sustaining film censorship legislation the Court indicated that there are differences which distinguish prior restraint in this form from its application in other areas.

The states and communities which have adopted film licensing techniques have pleaded necessity as a justification for departure from the traditional use of subsequent punishment as a means of control.[138] Their argument is that films present a unique problem in matters of obscenity. If they are not reviewed before showing, the remedy of prosecution under criminal statutes comes too late to avert the evil. With the modern theatres holding mass audiences and the program of multiple distribution within the state, piecemeal prosecution is simply impractical. Furthermore, the punishment falls upon the wrong person. The exhibitor is not always able to choose the type of films he shows.[139] Thus the real culprits, the producers and distributors, lose only a

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[133] Butler v. Michigan, 352 U.S. 380 (1957).

[134] See, Note 69 Yale L.J. 141 (1959). *But see, supra* note 41.

[135] Levy, Legacy of Suppression (1960).

[136] See, Emerson, *The Doctrine of Prior Restraint,* 20 Law & Contemp. Prob. 648, 667 (1955).

[137] Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957).

[138] See, Brief for the Respondent, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[139] He is in an analogous situation to the magazine seller who is forced to take magazines he doesn't want in order to get the ones he does. It is questionable whether the film exhibitor could set up the defense of lack of *scienter* used successfully in Smith v. California, 361 U.S. 147 (1959).

certain box-office take and nothing more. The solution lies, then, in a system of prior review and licensing of films which protects the community and exhibitors at the same time.

Prominent among other reasons for justifying prior control of films ranks the fact that movies are considered an entertainment medium.[140] Since the theory of constitutional liberty had been traditionally associated with the political process,[141] for a long time entertainment was regarded as unprotected. But by 1942 protection began to be extended.[142] Even here it was not clear whether the protection was given on the basis of the Constitution or from an inability to distinguish entertainment from the expression of ideas.[143] But it was clear from what happened in the area of motion pictures that the protection was not of the same quality as that afforded other media of the press.[144] Hence the proposition about freedom of entertainment could be put thus: entertainment was equally protected with other speech, but that protection would be unequally withdrawn since its social value was not of the same weight as that belonging to other areas of expression. Whatever one may think of a theory of social utility in the matter of speech, the facts in the film cases seem to point up its current adoption by the majority of the Court.[145]

Other differentiating elements are less theoretical. The fact that obscenity has become almost the only standard proper for film censorship,[146] indicates the narrow scope which the licensing

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140 This does not mean that movies are not also ranked as one of the arts, but simply that the industry is set up as a medium of mass entertainment. Manvell, Film and the Public 227-28 (1955).

141 Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J. concurring). Alexander Meiklejohn has made the political process of self-government the basis of his theory of free speech. See Meiklejohn, Free Speech (1948) and, *The First Amendment Is an Absolute*, Sup. Ct. Rev. 245-65 (1961). But in this last article he makes it plain that art (including movies) is part of the protected political process, *id.* at 262-63.

142 Hannegan v. Esquire, Inc., 327 U.S. 146 (1946).

143 Winters v. New York, 333 U.S. 507 (1948). Justice Reed for the majority seems to give entertainment protected status by default when he said, "The line between informing and entertaining is too elusive for the protection of that [exposition of ideas] basic right." *Id.* at 510.

144 The fact that censorship of a free medium has been approved in any form is such an indication. Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961). See, Adams Theatre, Co. v. Kennan, 12 N.J. 267, 96 A.2d 519 (1953).

145 See, Kalven *supra* note 111 at 11.

146 Although the court has never explicitly limited censorship to this single standard, most people have read their opinions as indicating that. See, Nimmer, *The Constitutionality of Official Censorship of Motion Pictures*, 25 U. Chi. L. Rev. 625 (1958). Also, this estimation is reflected in the legislation that Pennsylvania passed in 1959. *Supra* note 67.

power of the censor now has. This was not always the case.[147] There was a time when the censor was given a mandate to rove at large behind such indefinite standards as "the best interests of the people."[148] Then, too, a distinctive feature of film control is the fact that the speech in question is before the licensing official so that judgment on it is not of a conjectural nature.[149] Where an official issues a license to speak based on evidence entirely extrinsic to the speech itself,[150] there is grave danger that his judgment will prevent a legitimate communication of ideas. But where, as in film licensing, the speech itself is before the official as it will be presented to the public, at least the denial of license can be compared to the speech questioned.[151] Further, the distinction made in *Kingsley Books*[152] between restraint falling on communication before publication and after might be behind the Court's sustaining motion picture licensing, especially where it is done on a community, and not a state, basis. The film is already published and may have been shown elsewhere in the state before it is reviewed by the local board of censors. It would seem captious to demand that each film should have one free showing and then allow the state to step in with the censor. This would hardly be a constitutional distinction on which protection could be based.[153]

One of the worse features of the film licensing system is the costly delays that may take place between the time a refusal of a license is first made and a final determination of the issue by a court.[154] The right to appeal from the censor's decision seems

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147 The broad scope of the censor's powers is indicated by the standards discussed in *supra* notes 57-64 and accompanying text. For a description of the abuses, see Kupferman & O'Brien, *Motion Picture Censorship—The Memphis Blues,* 36 Cornell L.Q. 273 (1951).

148 Gelling v. Texas, 343 U.S. 960 (1952).

149 For this point, see Shapiro, Prior Restraint and Free Speech (unpublished thesis in Harvard Law School Library 1957). This was the defect that was condemned in Near v. Minnesota, 283 U.S. 697 (1931).

150 Cantwell v. Connecticut, 310 U.S. 296 (1940).

151 The fact that the film is part of the record allows the court to view the speech in question exactly as it was before the licensing official. American Civil Liberties Union v. City of Chicago, 3 Ill.2d 334, 121 N.E.2d 585 (1954). This point is made by Freund, *The Supreme Court and Civil Liberties,* 4 Vand. L. Rev. 533 (1951).

152 Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

153 *Ibid.*

154 This delay is directly related to the property right in the film which the owner or distributor has. Typical of the amount of time involved in litigating the issue of withholding a license for a film is that found in "Lady Chatterley's Lover":

(Footnote continued on next page)

to be protected whether granted by the licensing statute or not,[155] but whether the movie litigant can appeal to the courts before he has exhausted his remedies within the licensing system itself is doubtful.[156] The judgment of the censor represents an administrative decision which courts tend to uphold on grounds of legislative authorization, but the deference shown by the courts in review can be adjusted to the type of determination and the amount of expertise involved.[157] In the movie cases courts have moved away from the criterion of abuse of discretion to a fuller de novo determination of the issue.[158] This is possible because of the presence of the film as part of the record. But there remains the difficulty that during the long litigation the exhibitor is prevented from showing a film which may, in the end, receive approval. The loss to both himself and the community can hardly be repaired by a later showing.

The use of prior licensing of motion pictures is a unique experiment in peace-time censorship which has against it traditional distrust, Supreme Court dicta, not to say a bad personal record. Still the Court has refused to strike it down as a system of control. The answer to the conundrum of why the Court has continued to endorse the use of prior restraint in an area of free expression lies in the unique features of the movies as a medium and the subsidiary problem of obscenity. Further, the invalidation of a whole system of control seems to go beyond the purposes of the Court and encroach upon the policy choices of the state. Justice Black has complained that the Court should not place itself in the midst of such policy questions as obscenity and motion pictures,[159] but by invalidating an entire method of control in the abstract the Court would have effectively set policy

(Footnote continued from preceding page)
license denied May 1956—Supreme Court reversed censor's decision as unconstitutional June 1959. There is no provision for a speedy trial of the issue in movie cases as New York provides for books thought to be obscene. See, Kingsley Books, Inc. v. Brown, *ibid.*

[155] Schuman v. Pickert, 277 Mich. 225, 269 N.W. 152 (1936); Thayer Amusement Corp. v. Moulton, 63 R.I. 182, 7 A.2d 682 (1939).

[156] It would seem that the argument made for a direct challenge of the licensing official's denial would not be valid since the system itself has been approved in *Times Film.*

[157] Universal Camera Corp. v. National Labor Relations Bd., 340 U.S. 474 (1951).

[158] American Civil Liberties Union v. City of Chicago, 3 Ill.2d 334, 121 N.E.2d 585 (1954).

[159] Kingsley Int'l Pictures Corp. v. Regents of New York, 360 U.S. 684, 691 (1959).

for the state. It is from a respect for the federal system and the separation of powers that the Court has continued to pursue a method of balancing which answers to the demands of each case, without at the same time refusing to give certain general principles as a guide to the future.

III.

Times Film may be considered a bold experiment by the Court or an exercise in tradition, depending on your point of view. But the dangers involved were not inconsiderable. The feeling expressed by the Chief Justice that there was no way to check the spread of censorship to other areas of communication was shared by others. Indeed, the citation of *Times Film* by a dissenting New York judge[160] would indicate that it could be read as precedent for refusing to license a political speaker. Such careless use of precedent gave reason for siding with Warren in his charge that the Court had opened the way to censorship.

However, those who foresaw the dangers in *Times Film* and its apparent lack of concise principles were underestimating the abilities of other courts to see and understand the decision in its four corners. Thus in at least three cases the approval of censorship as given here was not an occasion for enlargement, but restriction, of the censor's power.

In *Zenith Int'l Films Corp. v. City of Chicago* [161] the same licensing system which the Supreme Court had refused to strike down *in toto* in *Times Film* was criticized for its failure to provide adequate procedural safeguards. The case involved a refusal of license to the French film "The Lovers." In an attempt to work out a compromise on the amount to be cut from the film, the distributor met with indifference and an intra-office dispute. The result was that the initial conditions were maintained after the mayor had reviewed the decision by viewing only a single reel of the film. The Seventh Circuit found that no substantial procedural justice had been done and reversed the decision of the lower court upholding the censor's finding.[162] The court referred to *Times Film* in concluding:

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[160] Rockwell v. Morris, 211 N.Y.S.2d 25, 41 (1961) (Eager, J., dissenting).
[161] 291 F.2d 785 (7th Cir. 1961).
[162] It is not clear from the case whether the reversal was an order to issue a license or whether it remanded the film for a fair procedure before the Chicago board.

> The recent *Times Film* decision does not provide a *carte blanche* authorization for *ad hoc,* unfair, abortive municipal licensing procedures. We reemphasize that it does hold that a city has the power to impose a system of prior restraints on movies, if it does so properly.[163]

This "proper" use of censorship will have to include more of the traditional safeguards of trial procedure if it is to receive approval from the courts.

Another case dealing with the same movie came to the same conclusion.[164] Here, however, the movie exhibitor had shown his film after a license had been denied and was charged with a criminal violation of the Portland, Oregon, licensing ordinance. By demurrer the defendant waived a jury trial and won his case on appeal to the Oregon Supreme Court. That body felt that the complaint against the defendant did not state a crime on which conviction could be made since it charged only that he had failed to make two cuts in a film.[165] No reasons for the cuts were given and no opportunity to show that the film met city standards had been allowed. This was not the type of crime which cities were allowed to prosecute. The Oregon court assumed "without directly deciding that the city may censor motion pictures without running afoul the First Amendment, as suggested by the Supreme Court in *Times Film v. City of Chicago.*"[166] This interpretation of *Times Film* appears excessively guarded, but it indicates that Oregon is not surrendering its right to rule on film censorship in the future.

Pennsylvania went even further in its declaration of independence from the interpretation of the Supreme Court. In deciding *William Goldman Theatres, Inc. v. Dana*[167] the Supreme Court of that state held that all prior censorship was outlawed by the Constitution of Pennsylvania once and for all.[168] In 1959 the legislature had passed a new Motion Picture Control Act

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[163] Zenith Int'l Films Corp. v. City of Chicago, 291 F.2d 785, 790 (7th Cir. 1961).

[164] City of Portland v. Welch, 364 P.2d 1009 (Ore. 1961).

[165] It is not clear whether the fault lay in the wording of the indictment or whether the court would have cut through to the real issue of lack of procedural due process anyway.

[166] *Id.* at 1012.

[167] 405 Pa. 83, 173 A.2d 59 (1961).

[168] Pa. Const. art. 1, §7 (1874). The wording that the court appeared to rely on was that which held a person as "being responsible for the abuse of that liberty."

which was carefully tailored to the specifications of the Supreme Court's decisions on movies and obscenity.[169] This Act was challenged by injunction on grounds that it violated the constitutional right to freedom from prior restraint. The federal grounds were abandoned after the *Times Film* case came down,[170] and invalidity was argued solely from the Pennsylvania Constitution. In upholding this contention the majority of four justices read the text of their fundamental law as prohibiting any prior controls.[171] But they then went on to point out individual difficulties with the Act, major among which was the lack of a trial determination of the issue of obscenity.[172] In dissent three justices found great difficulty with the reading of the Pennsylvania Constitution in a manner contrary to the federal one.[173] Then, too, the interpretations of various sections of the Act were made in such a way as to make them invalid, going contrary to the ordinary procedure of the court to read any law so as to save it.[174] Finally, the dissent pointed up the problem of the court's striking down an act which had received all but unanimous support in the legislature, had been the fruit of careful investigation and had not been given an opportunity to function at all.[175] But the

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[169] 4 Pa. Stat. §70.1-70.14. The Act adopted the obscenity definition from *Roth*, §70.1(6); and the suggestion from *Kingsley Books* that some publication should be allowed before review, §70.3.

[170] Argument of the case was postponed until the Supreme Court had decided the *Times Film* case. William Goldman Theatres, Inc. v. Dana, 405 Pa. 83, 95, 173 A.2d 59, 71 (1961).

[171] Pa. Const. art. 1, §7 (1874).

[172] William Goldman Theatres, Inc. v. Dana, 405 Pa. 83, 98, 173 A.2d 59, 64. Pa. Const. art. 1, §§6, 9 (1874). Since a person could be convicted on the grounds of communicating obscene materials on the basis of a denial of license by the board of censors, the majority felt that the right to a jury trial on the issue of obscenity would be denied.

[173] William Goldman Theatres, Inc. v. Dana, 405 Pa. 83, 85-86, 173 A.2d 59, 71-72.

[174] *Id.* at 102, 173 A.2d at 78. This raises the problem which the Supreme Court appeared to have avoided in the *Times Film* case, viz., the construction of a statute challenged as void-on-its-face. See Note, 1961 Wisc. L. Rev. 659.

[175] *Id* at 103, 173 A.2d at 79. This point is made by Kauper, Civil Liberties and the Constitution 73-74 (1962):

> It must be remembered that obscenity legislation may effect all readers and that it does not operate with discriminatory effect upon one particular group of persons as in the case of legislation directed against expression of political or religious views by unpopular minority groups. Here is a case where the ordinary legislative processes are adequate to deal with the problem and where a preponderant public sentiment should indeed play a controlling part. If people do not care to have obscenity legislation, their efforts should be directed to repeal of this legislation. Obscenity laws may be ill-conceived and inadequate to achieve the purpose of promoting public morals. But it is not the business of the courts to condemn as unconstitutional legislation they regard as unwise or ineffective.

result was clear. The state was not going to wait on the Supreme Court for a protection of rights that belonged to citizens of that state.

If further guarantees are needed that the narrow approval of *Times Film* will not result in a run-away censor, we must look to the Court itself. It has shown a continuing interest in protecting the right of films to be communicated to the public at large as long as they do not infringe the counter right of the state to protect the community against the corrupting effects of obscene or pornographic movies. That this interest will continue has been implied in the very nature of the method adopted by the Court in *Times Film.*